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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MEGAN SCHMITT, DEANA
REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
individually and on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

YOUNIQUE, LLC,

Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT
YOUNIQUE LLC'S MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

*Filed Concurrently with the
Declaration of Adam Gonnelli,
Plaintiffs' Statement of
Disputed Facts, and Plaintiffs'
Response to Defendant's
Statement of Disputed Facts*

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Trial Date: 2/19/19

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Genuine issues of material fact preclude summary judgment in this case. Defendant Yunique sold the “Moodstruck 3D Fiber Lashes” (the “Fiber Lashes” or the “Product”) while representing that the Product was composed of “Natural Fibers” and “100% Natural Green Tea fibers.” Independent testing, however, shows that these representations were false and that the product was actually comprised of synthetic nylon.

Defendant contends that Plaintiffs cannot demonstrate Article III standing or prove the elements of their warranty or state consumer protection law claims because they cannot demonstrate that: 1) they saw the “natural” representation before buying the Product; 2) they relied on the “natural” representation in deciding to purchase the Product; 3) that they paid more for the Product based on the “natural” representation. Each of these arguments, however, presents issues of fact that need to be resolved, and are thus inappropriate for summary judgment. As such, Defendant’s motion should be denied in its entirety.

II. FACTS

Yunique marketed and sold the product at issue in this case, the “Moodstruck 3D Fiber Lashes” (the “Fiber Lashes” or the “Product”) between October of 2012 and July of 2015. The Lashes have two components: an applying gel and the fiber lashes themselves.

See Declaration of Adam Gonnelli In Support Of Plaintiffs’ Opposition to Defendant’s Summary Judgment Motion (“Gonnelli Decl.”)

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[REDACTED]

[REDACTED]

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15 [REDACTED]
16 [REDACTED]

17 **III. STANDARD FOR SUMMARY JUDGMENT**

18 Summary judgment is appropriate if there is no genuine issue as to any
19 material fact and the moving party is entitled to judgment as a matter of law. *See*
20 Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing there
21 is no genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
22 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary
23 adjudication, or partial summary judgment "upon all or any part of [a] claim," is
24 appropriate where there is no genuine dispute as to any material fact regarding that
25 portion of the claim. Fed. R. Civ. P. 56(a); *see also Lies v. Farrell Lines, Inc.*, 641
26 F.2d 765, 769 n.3 (9th Cir. 1981). Material facts are those that may affect the
27 outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d
28

1 1144, 1147 (9th Cir. 2012) (citing. *Liberty Lobby*, 477 U.S.at 248). A dispute is
2 genuine "if the evidence is such that a reasonable jury could return a verdict for the
3 nonmoving party." *Liberty Lobby*, 477 U.S. at 248.

4 To defeat the motion for summary judgment, the responding party must
5 present admissible evidence sufficient to establish any of the elements that are
6 essential to the moving party's case and for which that party will bear the burden of
7 proof at trial. *See id.*; *Taylor v. List*, 880 F. 2d 1040, 1045 (9th Cir. 1989). The
8 Court may grant summary judgment only if the motion and supporting materials,
9 including the facts considered undisputed, show the movant is entitled to summary
10 judgment and if the responding party fails to properly address the moving party's
11 assertion of fact as required by Rule 56(c). *See Fed. R. Civ. P. 56(e)*.

12 In judging the evidence presented in support of or opposition to summary
13 judgment, the Court does not make credibility determinations or weigh conflicting
14 evidence. Rather, it draws all inferences in the light most favorable to the
15 nonmoving party. *See T.W. Electric Service, Inc. v. Pacific Electric Contractors*
16 *Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

17 **IV. PLAINTIFFS WERE EXPOSED TO THE "100% NATURAL GREEN**
18 **TEA FIBERS" REPRESENTATION AND PAID MORE FOR THE**
19 **PRODUCT AS A RESULT**

20 Younique makes the same three arguments for each of the Plaintiffs: 1) the
21 Plaintiffs were not exposed to the "100% Natural Green Tea Fibers" representation
22 before purchasing the Product; 2) the Plaintiffs did not rely on the "100% Natural
23 Green Tea Fibers" representation in purchasing the Product; and 3) the Plaintiffs did
24 not pay more for the Product based on the "100% Natural Green Tea Fibers"
25 representation.

26 These three "undisputed facts" are the basis for Defendant's motion for
27 summary judgment regarding Plaintiff Reilly's claims under Florida's Deceptive
28

1 and Unfair Trade Practices Act (“FDUTPA”) (Def. Mot. 13-14), Plaintiff
2 Orlowsky’s claims under the Tennessee Consumer Protection Act (“TCPA”) and
3 Tennessee express and implied warranty claims (Def. Mot. 16-18); Plaintiff
4 Schmitt’s claims under the UCL and California implied and express warranty laws
5 (Def. Mot. 18-21) and; Plaintiff Brun’s claims under Ohio implied and express
6 warranty laws (Def. Mot. 22-24). Defendant contends that because the Plaintiffs
7 allegedly were not exposed to the misrepresentation prior to purchasing the product,
8 purchased the product for reasons other than the fact that it was advertised as
9 “natural,” and did not pay more for the Product based on the misrepresentation, that
10 they lack standing and cannot show the necessary elements of the above claims.
11 (Def Mot. 16-21, 22-24).

12 But there is evidence to the contrary for each argument. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 **A. Each of the Plaintiffs was Exposed to the Misrepresentation Prior**
20 **to Purchasing the Product**

21 Defendant contends that none of the Plaintiffs saw the product labeling prior
22 to their first purchase of the Product, and therefore they cannot have standing and
23 cannot demonstrate the causation and injury elements of their warranty and state
24 consumer protection claims. Def Mot. 16-21, 22-24.

25 Contrary to Defendant’s argument, [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Thus, Defendant's
6 argument that the Plaintiffs lack standing and cannot prove their injuries under their
7 warranty and state consumer protection statute claims fails.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED] As with Plaintiff Reilly,
23 Defendant alleges that Ms. Orlofsky "did not see the Lash Enhancer's label before
24 her first purchase of it," and therefore she does not have standing and cannot
25 demonstrate the causation and injury elements of her Tennessee warranty and TCPA
26 claims. (Def. Mot. 16). [REDACTED]
27 [REDACTED]

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2 [REDACTED]
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5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Thus, each of the Plaintiffs was exposed to the content of Defendant's
10 "natural" misrepresentations prior to their first purchase of the Product. That alone
11 is sufficient to raise a genuine issue of fact as to whether the Plaintiffs suffered
12 injury and whether that injury was caused by Defendant's misrepresentation.

13 [REDACTED]
14 [REDACTED] Consequently,
15 their standing to pursue claims under Tennessee and Ohio law cannot be disputed.
16 Defendant's further arguments in regard to Orlowsky's Tennessee claims are
17 misplaced: a choice of law analysis is appropriate at a later time as standing has
18 clearly been demonstrated.

19 **B. Each of the Plaintiffs Purchased the Product as a Result of the**
20 **False "100% Natural Green Tea Fibers" Representation**

21 Defendant's second premise is that the Plaintiffs did not rely on the "natural
22 fibers" representations in purchasing the Product, but instead bought it for a variety
23 of other reasons. However, Plaintiffs' deposition testimony demonstrates [REDACTED]

24 [REDACTED]
25 [REDACTED] at the very least, creates a genuine issue of material fact.

26 [REDACTED]
27 [REDACTED]

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5 [REDACTED] Def Mot. 4-8, 17, 20-
6 21, 23. But, Plaintiffs “need not demonstrate that the defendant's misrepresentations
7 were ‘the sole or even the predominant or decisive factor influencing his conduct,’
8 the misrepresentations must have ‘played a substantial part’ in the plaintiff[s’]
9 decision making.” *Ogden v. Bumble Bee Foods, LLC*, No. 5:12-CV-01828-LHK,
10 2014 U.S. Dist. LEXIS 565, *25, (N.D. Cal. Jan 2, 2014) ((quoting *In re Tobacco II*
11 *Cases*, 46 Cal. 4th 298, 327 (Cal. 2009)). [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 **C. Each of the Plaintiffs was Injured by Paying More for the Product**
15 **Than They Otherwise Would Have**

16 Defendant next contends that the Plaintiffs have not produced evidence of
17 injury or damages. Def Mot. 14, 17, 21, 23. But, the injury in this case is
18 straightforward: the Plaintiffs paid more for the product than they otherwise would
19 have based on Defendant’s false representation that the Product was “natural.”

20 Indeed, each of the Defendants testified [REDACTED]
21 [REDACTED]
22 [REDACTED] Consequently,
23 the Court should reject Defendant’s arguments regarding injury and damages.
24 [REDACTED]

25 1 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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11 [REDACTED] This is all that is required to establish Article III
12 standing. *See Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1128 (N.D. Cal. 2014)
13 ("Article III's standing requirements may be satisfied by allegations that a plaintiff
14 purchased a product he otherwise would not have purchased, or spent more on such
15 product, in reliance on the defendant's misrepresentations."); *see also Brazil v. Dole*
16 *Food Co.*, 935 F. Supp. 2d 947, 962 (N.D. Cal. 2013) (holding that "Brazil suffered
17 a concrete and particularized injury . . . [because] he allegedly was deceived, and
18 then paid money that he would not otherwise have paid had he known about the true
19 nature of Defendants' products").

20 Defendant presents a number of other arguments to demonstrate that Plaintiffs
21 did not suffer an injury. First, Defendant notes that Plaintiffs Brun and Orlowsky
22 were paid commissions for selling the Product. Def. Mot. 17, 23. [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 Nor does Defendant's contention that Plaintiffs Brun and Schmitt [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
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15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 With respect to Younique's argument on the Ohio statute of limitations, Ms.
19 Brun retains her claim for rescission. *Rosenow v. Shutrump Assoc*, 163 Ohio App.
20 3d 500, 505 (Ohio Ct. App. 2005).

21 **D. The Expert Report of Doctor May Presents A Classwide Theory of**
22 **Damages**

23 Defendant takes a half-hearted swipe at the report of Plaintiffs' Damages
24 Expert, Dr. Donald May. First, Younique argues that [REDACTED]
25 ² [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] In any case, this is an issue that should be addressed as part of the *Comcast* analysis in the pending class certification motion.

V. CONCLUSION

For the reasons stated above, Defendant's motion for summary judgment should be denied in its entirety.

Dated: October 22, 2018

NYE, PEABODY, STIRLING, HALE & MILLER, LLP

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Dated: October 22, 2018

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